(5)

No. 85-701

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
*Appellant,*

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
*Appellee.*

**On Appeal from the United States Court of Appeals for the First Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

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## MOTION FOR LEAVE TO FILE BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

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Pursuant to Rule 42 of the Rules of this Court, Common Cause hereby moves this Court for leave to file a brief as *amicus curiae* in this case. Counsel for Appellee has consented to the filing of the attached brief, by a letter that has been filed with the Clerk of the Court. The consent of counsel for Appellant was requested but was refused.

As set forth in the attached brief at 1-4, Common Cause has a strong interest in the disposition of this appeal and believes that its perspective differs from that

of any party. In its brief, Common Cause urges the Court to reverse the decision below and in that respect seeks the same result as the appellant. This motion and the attached brief are timely filed in accordance with Rule 36.3 of the Rules of this Court.

Respectfully submitted,

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## BRIEF FOR COMMON CAUSE AS AMICUS CURIAE

## INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

Common Cause is a nonprofit, nonpartisan organization with approximately 250,000 members. One of its central purposes is to further responsible and honest government, accountable to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process, including other cases before this Court concerning the constitutionality and implementation of the federal election laws.[1]

[1] *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *const. qns. answered*, 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided court*, 455 U.S. 129 (1982); *FEC v. National Conservative Political Action Comm.*, 105 S. Ct. 1459 (1985).

## I.

Section 441b is constitutional on its face. This Court's recent unanimous decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (*"NRWC"*), confirmed that section 441b serves two compelling governmental interests—the prevention of actual and apparent corruption and the protection of corporate shareholders and union members. Those interests are "sufficient to justify" the statute's prohibitions and are "sufficiently tailored" to avoid undue restriction of First Amendment rights. *Id.* at 208. *NRWC* built on earlier decisions of this Court which recognized the critical importance of preventing actual and apparent electoral corruption, *see, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *United States v. International Union United Automobile Workers*, 352 U.S. 567 (1957), and on other decisions which concluded that corporate election spending presents particularly acute risks of electoral corruption, *see, e.g., California Medical Association v. FEC*, 453 U.S. 182 (1981).

The logic of *NRWC* and these other decisions compels the conclusion that Congress acted constitutionally in barring corporate and union expenditures as well as contributions. Congress, after painstaking consideration, found that even independent expenditures by corporations and unions directly implicate the compelling purposes section 441b serves. Section 441b imposes only slight burdens on First Amendment interests, which are justified in view of the unique characteristics of the corporate form. This case, therefore, is altogether different from *Buckley v. Valeo*, *supra*, and *FEC v. NCPAC*, 105 S. Ct. 1459 (1985), where the Court could discern no basis for concluding that independent expenditures by individuals and political committees presented risks of actual or apparent corruption. Those were not "'corporations' case[s]." *See id.* at 1468.

It has for years been Congress' expert judgment that a general ban on all corporate and union contributions



and expenditures is necessary to protect the integrity of the electoral process and to protect corporate shareholders and union members. Congress cautiously adapted section 441b over 79 years to account for the special attributes of and threats presented by organizations in corporate and union form. *See NRWC*, 459 U.S. at 209. In particular, Congress, upon an ample factual record, found that it was necessary for section 441b to cover independent expenditures in order for the statute to achieve its compelling objectives.

## II.

Section 441b is constitutional as applied to Massachusetts Citizens for Life ("MCFL"). A clear line that places all corporations and unions within the scope of section 441b is necessary to prevent evasions of the statute and vexing questions of degree. Such Congressional line-drawing is entitled to deference. *NRWC* sustained the applicability of section 441b to an organization remarkably similar to MCFL. The Court rightly declined to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 208. MCFL can, as it subsequently did, form a "political committee" to raise and spend money in federal elections; the burden on members' First Amendment rights is inconsequential in these circumstances.

In the unlikely event that there are doubts as to the constitutionality of section 441b as applied to MCFL, the Court could avoid the necessity of resolving those doubts by reading a narrow exception into section 441b for corporations that: (1) are not-for-profit and do not engage in any commercial activities; (2) have no shareholders or others with a claim on their earnings; (3) were not established by a business corporation or union and do not accept contributions from such entities; and (4) were formed for the express purpose of promoting political or ideological positions and are funded solely by voluntary contributions from individuals who have been

informed that the funds will be spent in connection with federal elections.

If the Court should decide to read such a tightly circumscribed exception into the statute, it should make clear that any corporation that came within that exception would be a "political committee" under the Federal Election Campaign Act, 2 U.S.C. § 431(4)(A), subject to that Act's disclosure requirements and contribution limits.

## ARGUMENT

This Court's unanimous decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("*NRWC*"), requires reversal of the decision below.

Even apart from that direct authority, Congress plainly has the power to prohibit corporations and labor unions, as a general matter, from giving financial support to federal candidates. Congress has found repeatedly over 79 years that such a prohibition serves compelling interests in protecting the integrity of the electoral process. Thus, there can be no serious question that 2 U.S.C. § 441b is constitutional on its face.

The only substantial constitutional question here is whether Congress drew the line at an improper point when it barred all use of the corporate form for engaging in financial support of federal candidates, including use by individuals who wish to associate for purely ideological purposes. The prohibition on use of the corporate or union form leaves ample scope for such individuals to exercise freedom of speech and association through other forms of organization, including affiliated "separate segregated funds" and other political committees.[2] In these circumstances, the clearcut line that Congress drew is appropriate and constitutional, because it provides the most certain standard in an area that would otherwise be vexed by evasions, circumventions, and close questions of degree.

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[2] *See* 2 U.S.C. §§ 441b(b)(2)(C), 431(4) (1982).



## I. SECTION 441b IS CONSTITUTIONAL ON ITS FACE.

This Court's decisions in *NRWC* and previous cases establish that section 441b is constitutional on its face. The statute has been found to serve two compelling governmental interests: (1) preventing the actual and apparent corruption that could arise if corporations and unions were free to use the funds amassed as a result of their unique organizational characteristics to make contributions or expenditures in federal elections; and (2) protecting the interests of corporate shareholders and union members. This Court has deferred to Congress' expert judgment, reaffirmed in repeated enactments over many decades, that a ban on corporate and labor union giving and spending in connection with federal elections is necessary to achieve those purposes. In short, both this Court and Congress have recognized section 441b to be an essential cornerstone of our federal campaign finance laws.

### A. This Court's Decisions Establish the Facial Constitutionality of Section 441b.

This Court's decisions foreclose any argument that section 441b's prohibition of corporate and union contributions and expenditures is unconstitutional on its face.

Most recently, in *NRWC*,[3] a unanimous Court upheld the constitutionality of section 441b's prohibition of a corporation's expenditure of treasury funds to solicit contributions from the public at large for its separate segregated fund, or political action committee ("PAC").[4] The

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[3] 459 U.S. 197 (1982).

[4] NRWC was a corporation prohibited from making contributions or expenditures with its own funds, except as provided by section 441b(b). 459 U.S. at 205 n.6. If the corporation had spent money to solicit contributions from persons other than its members, then it had violated section 441b by expending corporate treasury funds to influence the general public in connection with a federal election. 501 F. Supp. 422, 437 (D.D.C. 1980) (district court opinion). This Court decided that the persons solicited by NRWC were not its

PAC planned to use the money to make contributions and independent expenditures supporting and opposing candidates for federal office.[5] This Court resoundingly confirmed that the compelling governmental interests underlying section 441b—preventing corruption and the appearance of corruption, and protecting minority shareholders—were "sufficient to justify" the statute's prohibitions.[6] The Court found the statutory provisions "sufficiently tailored" to those compelling interests "to avoid undue restriction" on First Amendment interests,[7] and concluded that the statute "reflects a permissible assessment of the dangers posed by [corporations] . . . to the electoral process."[8] The *NRWC* opinion reaffirmed that corporations are special entities requiring "particularly careful regulation."[9]

*NRWC* built on a long line of cases in which this Court has recognized the importance of preventing both the fact and the appearance of corruption of elected officials, and the harm to public confidence in our system of representative government occasioned by such actual or apparent corruption.[10] It "has never been doubted" that

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members and upheld the constitutionality of section 441b's ban on such corporate spending.

[5] *See* 501 F. Supp. at 426; 665 F.2d 371, 373 (D.C. Cir. 1981) (court of appeals opinion).

[6] *NRWC*, 459 U.S. at 208.

[7] *Id.*

[8] *Id.* at 209.

[9] *Id.* at 209-10. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.13 (1978) ["*Bellotti*"] ("a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations").

[10] *NRWC*, 459 U.S. at 208; *Bellotti*, 435 U.S. at 788-89; *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) ["*Buckley*"] ("avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent' ") (quoting *United States Civil Service Comm'n v. National Association of Letter Carriers*, 413 U.S. 548, 565 (1973) ["*Letter Carriers*"]); *United States v. International Union United*



those interests are "of the highest importance."[11] Those interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process . . . issues [no] less than basic to a democratic society."[12]

*NRWC* also reflects the Court's past conclusion that corporate giving and spending markedly implicate the compelling interest in preventing corruption and the appearance of corruption.[13] Corporations are artificial legal entities endowed by the state with special advantages—such as limited liability, perpetual life, and special tax treatment—to facilitate their business objectives.[14] Those special advantages, "so beneficial in the economic sphere, pose special dangers in the political sphere."[15] The Court has repeatedly recognized the crucial role sec-

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*Automobile Workers*, 352 U.S. 567, 575 (1957) ["*Auto Workers*"]; *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934); *see FEC v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1469 (1985) ["*NCPAC*"].

[11] *Bellotti*, 435 U.S. at 788 n.26, 788-89.

[12] *Auto Workers*, 352 U.S. at 570; *id.* at 575 (section 441b serves to "sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.")

[13] *See NRWC*, 459 U.S. at 209-10 ("the special characteristics of the corporate structure require particularly careful regulation"); *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981) ["CMA"].

[14] In 1819, Chief Justice Marshall described the unique status of a corporation in the eyes of federal law:

> "A Corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as supposed best calculated to effect the object for which it was created."

*Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); *see also Bellotti*, 435 U.S. at 809 (White, J., dissenting).

[15] *Bellotti*, 435 U.S. at 826 (Rehnquist, J., dissenting).

tion 441b plays in avoiding "the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." [16]

The Court has found that the risk of actual or apparent corruption from involvement by corporations or unions in candidate elections is exacerbated by the economic purposes that guide the behavior of those entities.[17] Business corporations are created for economic profit; accordingly, their contributions and expenditures are almost necessarily made in order to receive something tangible in return.[18] This explains why, for example, Gulf Oil, Minnesota Mining and Manufacturing, and Diamond International, to name a few, made illegal corporate contributions to candidates of *both* parties in the 1972 presidential election.[19]

In addition, this Court has frequently recognized that section 441b protects shareholders and union members who have paid money into a corporation or union "for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." [20] Congress made clear that

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[16] *Auto Workers*, 352 U.S. at 585.

[17] *See CMA*, 453 U.S. at 201.

[18] *Hearings on Contributions to Political Committees in Presidential and Other Campaigns Before the House Comm. on Election of President, Vice President, and Representatives in Congress*, 59th Cong., 1st Sess. 12 (1906) ["1906 Hearings"]; *Hearings Before a Subcomm. of the House Comm. on Labor, H.R. 804 and H.R. 1483*, 78th Cong., 1st Sess. 71, 96, 146 (1943) ["1943 Hearings"].

[19] Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. 464, 469, 484 (1974) ["Senate Watergate Committee Report"].

[20] *See, e.g., NRWC*, 459 U.S. at 208, *citing United States v. Congress of Industrial Organizations*, 335 U.S. 106, 113 (1948) ["*CIO*"]; *see Bellotti*, 435 U.S. at 787-88; *Pipefitters Local Union 562 v. United States*, 407 U.S. 385, 413-16 (1972) ["*Pipefitters*"]. In other contexts as well, this Court has recognized the right of individuals not to be compelled to support candidates or political positions they oppose. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).



"[t]hese funds belong to the stockholders, and the officers have been forbidden by law for years from using the stockholders' funds in an election for these Federal officers." [21]

The logic of *NRWC* and these other cases compels the conclusion that Congress can constitutionally prohibit corporate and union expenditures, as well as contributions, in connection with federal elections.[22] As the Court observed in *Bellotti*, Congress legitimately could find "the existence of a danger of real or apparent corruption in independent expenditures by corporations [as distinct from individuals] to influence candidate elections." [23] Section 441b is based on a thorough Congressional investigation and documentation of the threat such expenditures pose to the integrity of the electoral process.[24] This

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[21] 93 Cong. Rec. 7492 (1947).

[22] The lower courts have uniformly upheld the constitutionality of section 441b in both contexts. *See Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc), *appeal dismissed, cert. denied*, 465 U.S. 1092 (1984) (challenge to prohibition on corporate contributions and expenditures, rejected on basis of *NRWC*); *United States v. Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States v. Chestnut*, 533 F.2d 40 (2d Cir. 1976), *cert. denied*, 429 U.S. 829 (1976); *Pipefitters*, 434 F.2d 1116 (8th Cir. 1970), *rev'd on other grounds*, 407 U.S. 385 (1972); *FEC v. Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978).

[23] 435 U.S. at 788 n.26.

[24] *See infra* pp. 14 to 15; *see generally* House Special Comm. to Investigate Campaign Expenditures, *Campaign Expenditures*, H.R. Rep. No. 2093, 78th Cong., 2d Sess. (1945) ["1945 House Investigative Report"]; Senate Special Comm. to Investigate Presidential, Vice Presidential, and Senatorial Campaign Expenditures in 1944, *Investigation of Presidential, Vice Presidential, and Senatorial Campaign Expenditures, 1944*, S. Rep. No. 101, 79th Cong., 1st Sess. (1945) ["1945 Senate Investigative Report"]; House Special Comm. to Investigate Campaign Expenditures, 1946, *Campaign Expenditures*, H.R. Rep. No. 2739, 79th Cong., 2d Sess. (1947) ["1947

Court should "not second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." [25]

The compelling governmental interests in prohibiting all direct financial involvement by corporations and unions in federal election campaigns far outweigh the effects of section 441b on the exercise of First Amendment rights. As this Court has repeatedly declared and as it reaffirmed in *NRWC*, "[n]either the right to associate nor the right to participate in political activities is absolute." [26] In *NCPAC*, the Court specifically stated, "[i]n return for the special advantages that the state confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." [27] And this Court has recognized that "[t]he differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." [28]

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House Investigative Report"]; Senate Special Committee to Investigate Senatorial Campaign Expenditures, 1946, *Investigation of Senatorial Campaign Expenditures, 1946*, S. Rep. No. 1, 80th Cong., 1st Sess. (1947) ["1947 Senate Investigative Report"].

[25] *NRWC*, 459 U.S. at 210.

[26] *Id.* at 207, *quoting Letter Carriers*, 413 U.S. at 567; *see also Buckley*, 424 U.S. at 25. To further its legitimate goals, Congress may properly require a group to comply with reasonable structural or organizational rules in order to exercise First Amendment rights. *See, e.g., Regan v. Taxation with Representation*, 461 U.S. 540, 543-45 & n.6 (1983) ("not unduly burdensome" to require a group to establish separate affiliated organization for lobbying activities in order to preserve tax deductibility of contributions for nonlobbying activities).

[27] *NCPAC*, 105 S. Ct. at 1468.

[28] *CMA*, 453 U.S. at 201, *quoted in part in NRWC*, 459 U.S. at 210.



Section 441b, then, presents an altogether different case than was presented in either *Buckley*, where the Court struck down a limit on independent expenditures by individuals and political committees,[29] or *NCPAC*, where it invalidated a limit on independent expenditures by any "committee, association, or organization (whether or not incorporated)." [30] This Court expressly stated in *NCPAC*, "this is not a 'corporations' case." [31] In both *Buckley* and *NCPAC*, the Court could discern no basis for a finding that the independent expenditures there in question could, under the circumstances, present a risk of actual or apparent corruption.[32] Here, in contrast, the Court has recognized that Congress could legitimately conclude that, because of the unique characteristics and purposes of corporations and unions, their independent expenditures would present palpable risks of corruption.[33] As we show in the next section, Congress has held to that view for many years.

### B. It Has Been Congress' Expert Judgment for Decades That a General Prohibition of Contributions and Expenditures by Corporations and Unions Is Necessary To Achieve Compelling Public Interests.

Congress enacted, and later reenacted, section 441b against a backdrop that shows vividly the need for the statute and its crucial role in preserving the integrity of the electoral process. As Justice Frankfurter recognized, "[a]ppreciation of the circumstances that begot

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[29] *Buckley*, 424 U.S. at 39-51.

[30] *NCPAC*, 105 S. Ct. at 1468.

[31] *Id.*

[32] *Buckley*, 424 U.S. at 46 ("the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions"); *NCPAC*, 105 S. Ct. at 1469 ("On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.").

[33] *Bellotti*, 435 U.S. at 788 n.26.

this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us." [34]

Section 441b found its origin in the growing concern at the turn of the century over the vast economic power of corporations and the undue influence they wielded in the political sphere, "an influence not stopping short of corruption." [35] Public sentiment swelled in the early 1900s in reaction to the public disclosure that national banks, insurance companies, and other business interests had given large sums to political parties and candidates, and attained commensurate influence over the politicians whose campaigns they had financed.[36] The massive influx of corporate funds in the 1904 election "crystallized popular sentiment for federal action to purge national politics of what was perceived to be the pernicious influence of 'big money' campaign contributions." [37]

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[34] *Auto Workers*, 352 U.S. at 570.

[35] *Id.*

[36] E. Zuckerman, *Origins of the 1907 Tillman Act* (Aug. 1982) (Fund for Constitutional Government). The Legislative Insurance Investigation Committee of New York discovered that in the presidential campaigns of 1896, 1900 and 1904, substantial amounts of money belonging to insurance policyholders was paid into party treasuries. The Committee concluded:

> "Contributions by insurance corporations for political purposes should be strictly forbidden. Neither executive officers nor directors should be allowed to use the moneys paid for purposes of insurance in support of political candidates. . . . Whether made for the purpose of supporting political views or with the desire to obtain protection for the corporation, these contributions have been wholly unjustifiable. In the one case executive officers have sought to impose their political views upon a constituency of divergent convictions, and in the other they have been guilty of a serious offense against public morals."

10 Report of the Joint Comm. on the Senate and Assembly of the State of N.Y. Appointed to Investigate the Affairs of Life Insurance Companies, 24, 110, 298, 334, 393, 397 (1906); *see also* 42 Cong. Rec. 696 (1908).

[37] *Auto Workers*, 352 U.S. at 571-72.



President Theodore Roosevelt responded by calling for legislation banning political contributions by corporations:

> "The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give the sovereign—that is, to the Government, which represents the people as a whole—some effective power of supervision over their corporate use. . . ." [38]

> "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes. . . ." [39]

In 1907, Congress enacted the Tillman Act, which made it "unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election . . . [and] for any corporation whatever to make a money contribution in connection with any [federal] election." [40] The legislative history reveals Congress' appreciation of the two compelling interests served by the prohibition—preventing the pernicious influence of corporate money in the electoral process, and prohibiting corporate managers from "defrauding the stockholders of money dishonestly and for an improper purpose." [41]

The Tillman Act was but "the first concrete manifestation of a continuing congressional concern for elections

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[38] 40 Cong. Rec. 91 (1905).

[39] *Id.* at 96; *see also* 1906 Hearings, *supra* note 18, at 12.

[40] 34 Stat. 864 (1907).

[41] 1906 Hearings, *supra* note 18, at 76 ("no corporation has the right and no board of directors of a corporation and no manager of a corporation has the right to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use"); *see id.* at 76-78.

'free from the power of money.'"[42] Since 1907, Congress has repeatedly reaffirmed the basic statute, while refining it. In 1925, Congress enacted the Federal Corrupt Practices Act to strengthen the statute by extending the definition of contribution to include "anything of value" and by penalizing the recipient of an illegal contribution as well as the giver.[43]

Congress later extended the statute to cover labor unions. With the rise in union political activities in the 1930s and 1940s, "the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process."[44] Congress enacted temporary wartime legislation to curb those abuses by extending the ban on contributions to labor unions, and made the prohibition permanent in the Taft-Hartley Act of 1947.[45]

During the 1940s, evidence mounted that corporations and labor unions were circumventing the ban on contributions by making expenditures. The House Special Committee on Campaign Expenditures, after an extensive investigation, concluded that the prohibition on contributions was rendered ineffective by widespread coordinated and independent expenditures which posed a grave

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[42] *Auto Workers*, 352 U.S. at 575 (citation omitted).

[43] 43 Stat. 1070, 1071, 1073 (1925).

[44] *Auto Workers*, 352 U.S. at 578; *see* 1943 Hearings, *supra* note 18, at 2 ("The public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials.").

[45] War Labor Disputes Act, 57 Stat. 633 (1943); Labor Management Relations Act of 1947, 61 Stat. 136 (1947); see *CIO*, 335 U.S. at 115.



risk of actual or apparent corruption. The Committee found:

> "The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?"[46]

A Senate investigative committee made similar findings and recommended that Congress extend the statute to cover corporate and union expenditures in order to:

> "plug the existing loophole whereby corporations, national banks, and labor organizations are enabled to avoid the obviously intended restrictive policy of the statute by garbing their financial assistance in the form of an 'expenditure' rather than a contribution."[47]

Congress therefore amended the law to proscribe expenditures as well as contributions.[48]

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[46] 1947 House Investigative Report, *supra* note 24, at 39. The Committee dealt with independent expenditures as well as those that were coordinated with candidates. *Id.* at 27-29. The report stated, "The committee feels that whether or not the activities carried on by these organizations and the payment of salaries to men known as organizers or advisers who go into the congressional districts and actively assist in local campaign activities, and expenditures for radio time, newspaper advertising, printing and distribution of handbills and posters, and for transportation of voters, constitute violations of the letter of the Federal Corrupt Practices Act, they certainly constitute violations of the spirit and intent of the law and the acts should be so amended as to clearly and distinctly set out that such activities are prohibited." *Id.* at 42-43.

[47] 1947 Senate Investigative Report, *supra* note 24, at 38-39.

[48] 61 Stat. 136 (1947). *See* 93 Cong. Rec. 6439 (1947) (remarks of Sen. Taft, a sponsor of the bill); *see also CIO*, 335 U.S. at 115

In 1971, Congress amended the statute to clarify the means of political participation that remain open to corporations and unions despite the ban on contributions or expenditures of treasury funds in federal elections. The amendments redefined the terms "contributions" and "expenditures" to permit corporations and labor unions to establish separate segregated funds ("PACs"), to communicate to their stockholders or members, and to engage in nonpartisan get-out-the-vote campaigns aimed at stockholders or members.[49] At the same time, Congress reaffirmed the need to maintain "a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to Federal candidates."[50] In the words of Rep. Orval Hansen, the sponsor of proposed amendments to the statute:

> ". . . the underlying theory of section 610 [now section 441b] is that substantial general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder."[51]

The 1971 amendments thus reflected "broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution."[52]

The Watergate scandal in 1972 once again focused the attention of Congress on section 441b and reconfirmed the compelling need for a ban on corporate contributions and expenditures. The Final Report of the Select Committee on Presidential Campaign Activities is replete

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("Since it was obvious that the statute as construed could easily be circumvented, . . . § 304 extended the prohibition of § 313 to 'expenditures.'").

[49] *See* 2 U.S.C. § 441b(b)(2) (1982).

[50] 117 Cong. Rec. 43381 (1971).

[51] *Id.*

[52] *Id., quoted in Pipefitters*, 407 U.S. at 431.



with examples of illegal corporate activity that are vivid reminders of why the statute remains so essential.[53]

American Airlines, for example, gave $55,000 in corporate funds to President Nixon's campaign because it was told that a large gift would put it in a "special class," and because it was afraid that it would be "prevented from getting something" if it did not give.[54] Ashland Oil gave $100,000 to the President's campaign and spent $10,000 to buy an advertisement supporting him. Ashland's Chairman explained the gift as an attempt "to assure ourselves of a forum . . . we felt we needed something that would be sort of a calling card, something that would let us in the door and make our point of view heard."[55] Associated Milk Producers, Inc. ("AMPI"), a dairy producers membership corporation, made illegal expenditures of $137,000 to assist the campaigns of Senator Humphrey and other Democratic candidates and officials.[56] Claude C. Wild, Jr., then Vice President of Gulf Oil, explained to the Senate Select Committee that Gulf had illegally contributed to three presidential candidates because of its fear that if Gulf did not participate, it might be placed on a "blacklist" or at the "bottom of the totem pole."[57]

In 1976, Congress further refined section 441b by enacting detailed provisions governing the expenditure of corporate funds to solicit contributions to a separate

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[53] Corporations would be in a position to dominate campaign finance. Prior to the Tillman Act, over 70% of the contributions collected by the Republican National Committee in 1904 came from representatives of corporations. H. Pringle, *Theodore Roosevelt: A Biography* 357 (1931), *citing* Campaign Contributions: Testimony Before a Subcomm. of the Senate Comm. on Privileges and Elections, vol. 1, 62d Cong., 2d Sess. 204-06 (1912).

[54] Senate Watergate Committee Report, *supra* note 19, at 447-51.

[55] *Id.* at 459-60.

[56] *Id.* at 870-81.

[57] *Id.* at 469.

segregated fund ("PAC").[58] In doing so, Congress reaffirmed its unbroken conviction that the prohibitions in section 441b are critical to the integrity of the electoral process.[59]

This 79-year history reflects Congress' "careful . . . adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations." [60] Congress has moved to prohibit activities when the evidence showed that they posed concrete and imminent threats to the electoral process, and it has carefully considered the First Amendment interests affected by its legislation, tailoring the statute to avoid unnecessary intrusion on those interests.[61] In short, Congress has narrowly drawn section 441b to serve admittedly compelling governmental interests.[62] "This careful legislative adjustment . . . warrants considerable deference" from the Court.[63]

## II. SECTION 441b MAY CONSTITUTIONALLY BE APPLIED TO MCFL BECAUSE IT IS A CORPORATION; IF THE COURT FINDS OTHERWISE, IT MUST TREAT MCFL AS A "POLITICAL COMMITTEE" WHICH IS SUBJECT TO THE FEDERAL ELECTION CAMPAIGN ACT.

### A. Section 441b Is Constitutional as Applied to MCFL.

Although the First Circuit did not question the facial constitutionality of section 441b, it held the provision unconstitutional as applied to "indirect, uncoordinated expenditures by a non-profit ideological corporation ex-

[58] *See* 2 U.S.C. § 441b(b)(4) (1982).

[59] *See* 122 Cong. Rec. 8570-72 (1976) (remarks of Rep. Brademas).

[60] *NRWC*, 459 U.S. at 209 (citation omitted).

[61] *See, e.g., CIO*, 335 U.S. at 120.

[62] *NRWC*, 459 U.S. at 208.

[63] *Id.* at 209.



pressing its views of political candidates." [64] That conclusion was erroneous. To promote the compelling governmental interests discussed above, Congress may constitutionally prohibit all corporations and unions from making either contributions or expenditures in connection with a federal election.

Section 441b must cover all corporations and unions in order to provide a clear and easily administrable standard. Experience has demonstrated that there are substantial incentives to exploit potential loopholes in campaign finance laws.[65] Congress has long appreciated the dangers of abuse in this area,[66] and has concluded that to prevent evasion, section 441b must apply to all corporations and unions. This Court has held that such Con-

[64] Juris. Statement 24a.

[65] *See supra* note 24; Senate Watergate Committee Report, *supra* note 19; *cf. Buckley*, 424 U.S. at 35-36, 38; Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 364-65 (1977).

[66] For example, in 1945, a Senate investigative committee reported that the "Common Citizens Radio Committee," incorporated under the laws of the state of Texas for "educational" purposes, was actually seeking to influence the 1944 presidential election and that it had received contributions from numerous business corporations. 1945 Senate Investigative Report, *supra* note 24, at 19-20, 44-53.

In the 1947 debates on the Taft-Hartley Act, Senator Barkley observed that "the National Association of Manufacturers does not manufacture anything, the United States Chamber of Commerce does not sell anything, and the Automobile Chamber of Commerce does not manufacture or sell anything." In response, Senator Taft, the bill's floor manager, stated, "In any event, so long as the money comes from corporations, and with their knowledge, I think it would be clearly illegal anyway, and they would be participating as corporations in spending for political purposes." 93 Cong. Rec. 6438 (1947).

The current campaign finance scandals in West Germany involve allegations that millions of dollars of illegal corporate donations were funneled to political parties through tax-exempt foundations. *See, e.g.*, N.Y. Times, Feb. 18, 1986, at A3, col. 5.

gressional line-drawing is entitled to substantial deference.[67]

Applying Congress' bright line, this Court in *NRWC* unanimously upheld the application of section 441b's solicitation limits to a corporation without capital stock organized expressly for ideological purposes—a corporation remarkably similar to Massachusetts Citizens for Life ("MCFL").[68] The court of appeals in *NRWC* had ruled that, because NRWC was a nonstock corporation organized solely for political purposes, it was constitutionally entitled to solicit funds for its affiliated PAC from persons who were not its members under state law.[69] This Court rejected the lower court's reasoning,

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[67] *See NCPAC*, 105 S. Ct. at 1470-71 (constitutional to prohibit contributions by membership corporations even though they "might not exhibit all of the evil that contributions by traditional economically organized corporation[s] exhibit"); *Buckley*, 424 U.S. at 70-71 (FECA disclosure requirements are constitutional as applied to minor parties, despite diminished governmental interests in disclosure); *id.* at 83 ($10 recordkeeping threshold and $100 reporting threshold are constitutional because the "line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion"); *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947) (constitutional to ban political activity by all types of classified federal employees, even though "the impartiality of many of these is a matter of complete indifference to the effective performance" of their duties).

[68] 459 U.S. at 199. NRWC was "a nonprofit corporation without capital stock that was formed to educate the public on and to advocate voluntary unionism. NRWC conducts a continuous and extensive program of advocacy through the dissemination of information on compulsory unionism to its members and to the general public." 665 F.2d 371, 373 (D.C. Cir. 1981).

In this case, "MCFL is an ideological, grass roots, nonpartisan corporation organized to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activity. . . . It was incorporated in 1973 as a nonprofit, nonstock corporation under Massachusetts law." Motion to Affirm at 2.

[69] 665 F.2d at 371, 374 & n.4, 375 n.9, 376.



holding that "the statutory prohibitions and exceptions we have considered are sufficiently tailored to [Congress'] purposes to avoid undue restriction on the associational interests asserted by respondent."[70] *NRWC* concluded:

> "While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[71]

In *NCPAC*, this Court explained that *NRWC* gave "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized."[72]

Accordingly, MCFL may constitutionally be prohibited from making contributions or expenditures in connection with federal elections. As discussed above, Congress may constitutionally place limits on the right to associate to participate in political activities in order to further compelling governmental interests. In particular, to prevent electoral abuse, Congress may restrict the use of the corporate form.[73] Persons sharing political or ideological views have no First Amendment right to associate together *as a corporation* to make campaign-related contributions and expenditures. To the contrary, in *NRWC* the Court declared that the claim that the Constitution guaranteed NRWC the right to solicit all those "who have in the past proved 'philosophically compatible' to

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[70] 459 U.S. at 208.

[71] *Id.* at 210. As noted above, the *NRWC* holding implicated the ban on corporate expenditures as well as contributions. *See supra* notes 4 & 5.

[72] *NCPAC*, 105 S. Ct. at 1471.

[73] *See supra* pp. 5 to 11; *NRWC*, 459 U.S. at 207, *quoting Letter Carriers*, 413 U.S. at 567; *Buckley*, 424 U.S. at 25; *CMA*, 453 U.S. at 201; *cf. Regan v. Taxation with Representation*, 461 U.S. 540, 543-45 & n.6 (1983).

the views of the corporation . . . would ignore the teachings of our earlier decisions." [74]

The governmental interests in prohibiting all direct financial involvement by corporations in federal election campaigns [75] outweigh the exceedingly slight burden that section 441b imposes on political expression by individuals who support MCFL. If MCFL's supporters wish to exercise their associational rights and to pool their funds for campaign-related purposes, they may easily form a "political committee"—affiliated with MCFL or independent of it.

Indeed, after making the expenditure at issue here, MCFL established a "separate segregated fund" or PAC.[76] MCFL may lawfully pay its PAC's administrative and solicitation expenses, and the PAC may lawfully solicit MCFL's members for voluntary contributions.[77] If, as MCFL claims, its contributors wish their

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[74] 459 U.S. at 210; *id.* at 207 ("In this case, we conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b.").

[75] *See supra* pp. 7-10, 19-20. These interests also apply to MCFL. Its contributors knew that the organization's purpose was to oppose abortions, Juris. Statement 35a (district court opinion), but the district court did not find that donors realized MCFL would promote this goal by spending money to support or oppose candidates for federal office. In addition, although MCFL states that it does not accept funds from business corporations, Affidavit of Philip D. Moran ¶ 9 (July 9, 1982), this policy is subject to change by a vote of the board of directors.

[76] Juris. Statement 25a n.1 (court of appeals opinion). The fund is named "Massachusetts Citizens for Life Political Action Committee," *see* Statement of Organization, filed with FEC, May 15, 1980, as required by law, 2 U.S.C. § 434(e)(5)(1982); 11 C.F.R. § 102.14(c) (1985).

[77] 2 U.S.C. §§ 441b(b)(2)(C), 441b(b)(4)(C)(1982). The fund "may be completely controlled" by MCFL, "whose officers may decide which political candidates contributions to the fund will be spent to assist." *NRWC*, 459 U.S. at 200 n.4.

In 1978, MCFL was a nonmembership corporation under its articles and by-laws. To make full use of its separate segregated fund,



money to be used in federal elections, those contributors would no doubt respond favorably to solicitations from a political committee affiliated with MCFL, bearing its name, and sharing its ideological goals. Alternatively, persons sharing MCFL's goals are free to establish a political committee unaffiliated with MCFL. Such a committee could not receive funds from MCFL for overhead expenses, but it would be permitted to solicit the general public (including MCFL members) for contributions. Since the organizational ties between MCFL and its contributors are relatively loose, no substantial associational values would be lost by the creation of such a separate committee.[78]

MCFL claims that creating a "political committee" is burdensome because disclosure is required, and the court

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MCFL changed its formal corporate structure in 1980 to become a membership corporation. Motion to Affirm at 11; Answer to FEC Interrogatories No. 6, 10 (D. Mass., May 6, 1982). In *NRWC*, this Court held that it is not unconstitutionally burdensome to limit solicitations by a nonstock corporation's separate segregated fund to persons who are members of the corporation under state law. 459 U.S. at 210.

[78] The record shows that MCFL obtained funds, inter alia, from individuals who attended MCFL's annual dinner, a fundraising event open to the general public, Deposition of Philip D. Moran at 71-72, 77-78 (Aug. 10, 1982), and from persons who designated a portion of their grocery bill to go to MCFL as their favorite charity in a promotional program at a local supermarket. *Id.* at 38-40. MCFL also raised funds through such activities as garage sales, cake sales, bike-a-thons, fashion shows, yard sales, dances, raffles, auctions, furniture sales, wine-tasting parties, flower sales, and cookbook sales. Affidavit of Philip D. Moran ¶ 8 (July 9, 1982). In 1978, when the expenditures at issue were made, none of MCFL's contributors had any right to vote for the board of directors, which was self-appointed and self-perpetuating. Deposition of Philip D. Moran at 25, 70. *Compare NRWC*, 459 U.S. at 206 ("Members play no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings. There is no indication that NRWC's asserted members exercise any control over the expenditure of their contributions.").

of appeals seems to have accepted this argument.[79] That is astonishing, because in *Buckley v. Valeo*, this Court endorsed the importance of disclosure requirements as a vital part of Congress' scheme of campaign finance regulation.[80] The small burden of disclosure is one that the Constitution permits because it serves compelling governmental interests.[81]

For these reasons, there should be no serious doubt about the constitutionality of section 441b as applied to MCFL. While drawing a clear line around all corporations and prohibiting them from making contributions and expenditures in connection with federal elections, section 441b allows ample scope for freedom of speech and association through organizations not using the corporate form. Moreover, the provision is a cornerstone of Congress' carefully designed scheme to protect the integrity of federal elections. To breach the ban on corporate contributions and expenditures would gravely weaken that edifice.

### B. If There Are Doubts About the Constitutionality of Applying Section 441b to MCFL, Section 441b Could Be Construed To Exclude Organizations Such as MCFL.

If, nonetheless, there are constitutional doubts, surely those doubts are narrowly confined to corporations formed expressly for political purposes and lacking any corporate or labor union connections. The necessity of

[79] Motion to Affirm at 11; Juris. Statement 21a n.7 (court of appeals opinion). Disclosure requirements are not, of course, an additional burden imposed on MCFL by the application of section 441b; they are a constitutionally permissible incident of making "contributions" or "expenditures" through any institutional mechanism.

[80] The Court recognized that disclosure requirements might deter some persons from making contributions, but upheld their constitutionality except as applied to a group that could prove that compelled disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 68-74. MCFL has not attempted to make such a showing.

[81] *Id.* at 60-68.



resolving those doubts could be pretermitted by reading into section 441b a narrow exception for political committees in corporate form that support federal candidates as well as advocating particular political positions. As the Court reaffirmed last Term, it "should 'not decide a constitutional question if there is some other ground upon which to dispose of the case.'" [82] In the unlikely event that the Court doubts the constitutionality of applying section 441b to MCFL, it might construe the statute to exclude entities such as MCFL.[83]

Any such statutory exception should be tightly circumscribed. The history of electoral abuse in this area shows that incautious characterization of an exception might be exploited by those corporations and labor unions that Congress unquestionably intended to bar from campaign-related financial activity.[84] We therefore suggest that no

[82] *Lowe v. SEC*, 105 S. Ct. 2557, 2563 (1985) (citations omitted); *see Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). In order to avoid deciding constitutional questions, the Court has often interpreted broad Congressional language to exclude a particular application in the absence of any "clear expression of an affirmative intention of Congress" to the contrary. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504, 507 (1979), *quoted in United States v. Security Industrial Bank*, 459 U.S. 70, 82 (1982); *see CIO*, 335 U.S. at 120-24; *United States v. Rumely*, 345 U.S. 41, 45 (1953); *International Ass'n of Machinists v. Street*, 367 U.S. at 749; *Letter Carriers*, 413 U.S. at 571; *Buckley*, 424 U.S. at 78-81.

[83] Section 441b literally applies to "any corporation whatever." However, the legislative history of the 1907 Tillman Act indicates that the word "whatever" was included to make clear that the statute covers corporations organized under state laws, not merely national banks and corporations organized by authority of an Act of Congress. *See* S. Rep. No. 3056, 59th Cong., 1st Sess. 2 (1906) ("all corporations, no matter under what laws created"); H.R. Rep. No. 6397, 59th Cong., 2d Sess. 1 (1907); 41 Cong. Rec. 1452 (1907) ("any corporation whether organized under the Federal Government or under the State").

[84] For the reasons stated cogently by the court of appeals, which are amply supported by the legislative history, Juris. Statement 6a-19a, this Court should not rely on any of the three statutory grounds on which the district court relied. The district court's rea-

corporation should be excluded from the coverage of section 441b unless it satisfies each of the following criteria: [85]

First, the corporation must be a not-for-profit corporation that does not engage in business or commercial transactions of any kind.[86] Second, the corporation must not have any shareholders or other affiliated persons with a claim to any of its assets or earnings.[87] Third, the corporation must not have been established by a business corporation or labor union and it must not accept contributions from business corporations, labor unions or other artificial entities, because Congress realized the danger that business corporations might use ostensibly nonbusiness corporations or other groups as conduits to spend money in connection with elections.[88]

soning, if accepted, would create loopholes susceptible to widespread exploitation and abuse.

[85] If the Court were to conclude that section 441b is unconstitutional as applied to MCFL, it should apply the same criteria in defining the scope of its holding, and should in addition limit the holding to independent expenditures such as those involved in the Special Election Editions.

[86] *See supra* pp. 7-8. Activities such as bake sales and car washes would not be "business or commercial transactions" if they were expressly designated as political fundraising events, so that all contributors were fully aware of their political purpose.

[87] *See supra* pp. 8-9. Section 441b extends beyond stock corporations. 2 U.S.C. § 441b(b)(4)(C) (1982); *see* 122 Cong. Rec. 7197-98, 12468-69 (1976).

[88] *See supra* note 66 (discussing 1945 Senate investigative committee report and 1947 debates on Taft-Hartley Act). Senator Taft specifically stated that the National Association of Manufacturers and the United States Chamber of Commerce, which had corporate members, could not use treasury funds in federal election campaigns. 93 Cong. Rec. 6438 (1947). He also indicated that the Chamber of Commerce, if incorporated, could not lawfully spend money in federal elections even if that money had been raised from individuals. *Id.* at 6439. Since the Chamber of Commerce obtained corporate treasury funds from its corporate members, receiving individual contributions as well would not eliminate its status as a corporate conduit.

According to the Commission's brief in *NRWC*, "NRWC has admitted that it receives a portion of its treasury funds from con-



Fourth, the corporation must have been formed for the express purpose of promoting political or ideological positions, and its sole source of funds must be voluntary contributions from individuals who have been informed that the funds will be spent for campaign-related purposes. If this criterion is not satisfied, there is an undue risk that contributors' funds will be used for campaign-related purposes of which they do not approve, contrary to Congress' intent.[89]

The Federal Election Commission has consistently taken the position that section 441b does not apply in one situation where all of these criteria are satisfied—the political committee that incorporates solely for liability purposes. In 1975, the Commission decided that, "[i]f a nonprofit organization is created expressly and exclusively to engage in political activities," and has incorporated for liability purposes only, "[t]hat type of corporation is essentially a political committee and may contribute its assets to Federal candidates the same as unincorporated political committees." [90] Although not

tributions from other corporations." Brief for Petitioners, *FEC v. NRWC*, at 37 (June 21, 1982). For this reason, NRWC would be covered even if section 441b excluded some other incorporated entities. Similarly, this criterion would exclude trade associations with corporate members.

[89] *See supra* pp. 8 to 9. This governmental interest supports Senator Taft's view that section 441b would prevent an incorporated church from making election-related contributions and expenditures. 93 Cong. Rec. 6440 (1947). Donors reasonably expect that their contributions to a church will be used for religious purposes, not to advocate the election or defeat of political candidates. Accordingly, Senator Taft's statement about churches does not inexorably lead to the FEC's conclusion that "Congress considered this purpose to apply fully to [all] non-profit corporations whose money comes from ideological adherents." Juris. Statement 19 n.15.

[90] Advisory Opinion 1975-16, 40 Fed. Reg. 36242, 36243 (1975). *Accord* Advisory Opinion 1975-37, 40 Fed. Reg. 42303 (1975). In a subsequent advisory letter, the Commission stated that "this conclusion is premised on the assumption that all receipts and disburse-

constitutionally necessary, it is a reasonable interpretation of the statute. Absent a congressional finding that a risk of abuse exists, the Commission is reasonable in declining to insist that a political committee that decides to incorporate thereby disqualifies itself from performing the activities for which it was created.[91] The Court could, if so impelled by constitutional concerns, broaden that exception solely to encompass organizations in corporate form that have other political or ideological activities in addition to electoral activities, and that meet the four criteria outlined above.[92]

### C. If MCFL Is Excluded from Section 441b, Then It Is a "Political Committee" Subject to the Federal Election Campaign Act.

If the Court decides that a narrow statutory exception to section 441b does exist, it should also make clear that corporations within that exception are "political committees" subject to the Federal Election Campaign Act ("FECA"). Under the FECA, a "political committee" is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[93] This language applies to all types of or-

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ments relating to all the [group's] varied activities will be regarded as though they were contributions and expenditures under the Act." Response to Advisory Opinion Request 1975-122, 1 Fed. Election Campaign Fin. Guide (CCH) ¶ 6020 (Sept. 2, 1976). *See* 11 C.F.R. § 114.12(a) (1985).

[91] *See NCPAC*, 105 S. Ct. at 1465, 1468 (appellees NCPAC and FCM were incorporated political committees, but the case was "not a 'corporations' case").

[92] MCFL might satisfy these criteria. *See* Juris. Statement 22a-23a (court of appeals opinion); *id.* at 26a (district court opinion) (describing MCFL's Statement of Purpose). MCFL asserts that it has a policy against accepting contributions from business corporations. Motion to Affirm at 2; Deposition of Philip D. Moran at 74-75.

[93] 2 U.S.C. § 431(4)(A) (1982); 11 C.F.R. § 100.5(a) (1985).



ganizations that are not forbidden by law from participating in federal elections. MCFL is an "association, or other group of persons" and it made expenditures of $9,812 in 1978 to support and oppose federal candidates in the Massachusetts primary election.[94] Therefore, it was a "political committee," unless it was a corporation forbidden to make those expenditures at all.[95]

In *Buckley*, this Court suggested that the definition of "political committee" should be construed to exclude "groups engaged purely in issue discussion";[96] but MCFL did not limit itself to "issue discussion." The courts below found that MCFL spent considerably more than the statutory threshold amount to print and distribute approximately 100,000 copies of a leaflet that supported the election or defeat of particular federal candidates.[97]

*Buckley* also suggested that "[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[98] That case, however, did not present to the Court the question whether "political committee" should be construed so narrowly that certain corporations could avoid section 441b and at the same time escape the FECA's disclosure requirements and contribution limits.[99] The Court's discussion in *Buck-*

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[94] *See* Juris. Statement 5a, 19a (court of appeals opinion).

[95] To inform the public, to deter corruption, and to facilitate enforcement of the law, political committees are required to register with the Federal Election Commission, to submit periodic reports, and to maintain records of receipts and disbursements. 2 U.S.C. § 432, 433, 434 (1982). In addition, political committees may receive no more than $5,000 from any individual in a calendar year. *Id.* § 441a(a)(1)(C).

[96] 424 U.S. at 79.

[97] Juris. Statement 18a n.6 (court of appeals opinion).

[98] 424 U.S. at 79.

[99] Unlike this case, the two lower court decisions cited by the Court did not involve express advocacy of the election or defeat of

*ley* cannot facilely be taken from its context as a predicate for freeing MCFL from the statutory requirements applicable to political committees.

MCFL cannot have it both ways. Either it is prohibited under section 441b from direct involvement in federal elections; or, if not, it must abide by the FECA disclosure requirements and contribution limits that this Court has upheld as essential to the integrity of the political process.[100] A corporation may not invoke its political purposes to justify its participation in the electoral process, notwithstanding section 441b, and then undermine the statutory scheme by obtaining hidden or unlimited contributions and making secret expenditures in connection with federal elections.

## CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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specific candidates. *See ACLU, Inc. v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (3-judge court), *vacated as moot*, 422 U.S. 1030 (1975); *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972).

[100] *Buckley*, 424 U.S. at 23-38, 60-69.